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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

NATHAN GEORGE DINITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A, 1a-25a) is reported at 492 F. 2d 53. The *per curiam* opinion of the court of appeals *en banc* (Pet. App. B, 26a-28a) is reported at 504 F. 2d 854. The opinion of the district court (Pet. App. D, 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals *en banc* (Pet. App. C, 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including January 26, 1975 (a Sun-

day). The petition for a writ of certiorari was filed on January 27, 1975, and was granted on March 31, 1975 (App. 45). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who has moved for and been granted a mistrial may prevent renewed prosecution on the ground that an unintentional error committed by the court at trial rendered his motion involuntary and that the court's granting of his motion did not satisfy the manifest necessity test.

2. Whether a court's declaration of a mistrial, manifestly necessary when made, may nevertheless bar renewed prosecution because the error creating the need for the mistrial may not itself have been manifestly necessary.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

1. In an indictment returned in the United States District Court for the Northern District of Florida on December 6, 1972, respondent Nathan George Dinitz and another were charged with having conspired to distribute a Schedule I controlled substance (LSD) and with having distributed such substance, in violation of 21 U.S.C. 841(a)(1).[1] Respondent initially retained Jeffrey Meldon to represent him. Meldon appeared with respondent at the arraignment and subsequently filed several pretrial motions. Approximately five days before trial, respondent retained Maurice Wagner as his trial counsel, although Meldon continued to do "investigation into the case" (App. 34). Wagner had not been admitted to practice before the United States District Court for the Northern District of Florida, but on the day of trial the court allowed him to appear *pro hac vice* on respondent's behalf. Meldon was also present as counsel of record at trial, as was Fletcher Baldwin, a professor of law at the University of Florida. Wagner advised the court at the beginning of trial that Baldwin would "make

[1] Respondent was charged in two counts of a three-count indictment (App. 3–4). Count I of the indictment—the conspiracy count—did not specify the precise conspiracy statute violated, although it is apparent that the intent was to charge the conspiracy as a violation of 21 U.S.C. 846. The court of appeals in fact stated that respondent was so charged (Pet. App. 1a). Respondent has not challenged this omission at any point in the proceedings, and there is consequently no need for this Court to consider it. *Lawn* v. *United States*, 355 U.S. 339, 362–363 n. 16. In any event, the indictment fairly informed respondent of the conspiracy charge against which he was required to defend himself and would have enabled him to plead an acquittal or a conviction in bar of any future prosecution for the same offense. *Hamling* v. *United States*, 418 U.S. 87, 117; *Eisner* v. *United States*, 351 F. 2d 55, 56–57 (C.A. 6), certiorari denied, 369 U.S. 859. Moreover, in light of the concurrent five-year sentences respondent received on Counts I and III, the absence of a reference in Count I to the conspiracy statute violated cannot have prejudiced him. *Barnes* v. *United States*, 412 U.S. 837, 844.

the arguments with regard to the law and I [Wagner] will try the facts * * *" (App. 5).[2]

Since the government's case against respondent depended largely upon the testimony of undercover agent Steve Cox concerning the circumstances of his purchase of LSD from respondent, Wagner's trial strategy was to attack Cox's credibility. Wagner began immediately to implement this strategy by attempting to suggest at the outset of his opening statement that respondent had been "set up" by the sale to Cox for a subsequent extortion attempt.[3] Wagner apparently hoped that the jury would infer from this suggestion either that Cox was the extortionist or that he had played some part in the extortion scheme (App. 39).[4]

[2] Prior to this clarification of the respective responsibilities of respondent's three retained attorneys, Meldon and Wagner alternately spoke on respondent's behalf (Tr. 3–44).

[3] The government's opening statement (App. 18–19) informed the jury that the case was relatively simple and that only two witnesses would be called to prove the charges against respondent—Steve Cox, who was to testify concerning his purchase of drugs from respondent, and the chemist who analyzed the substance purchased by Cox from respondent and found it to be lysergic acid diethylamide (LSD).

[4] Approximately one week after his arrest respondent had reported to the Federal Bureau of Investigation that he had received a telephone call from someone offering to arrange for all charges arising from the sale to Cox to be dropped if respondent would pay the caller a sum of money. With the Bureau's cooperation, an envelope was filled with paper and placed at the appointed pick-up spot. A man was observed picking up the envelope, but the Bureau was unable to apprehend him—although it was able to confirm that the man bore no resemblance to Cox (App. 39–40). No evidence linking Cox to the attempted extortion was ever developed.

After Wagner introduced himself and his co-counsel to the jury, the following colloquy ensued concerning his tactics in challenging Cox's credibility (App. 20):

> MR. WAGNER: * * * After working on this case over a period [of] time it appeared to me that if we would [have] given nomenclature, if we would have named this case so there could be no question about identifying it in the future, I would have called it The Case—
>
> MR. REED [Attorney, Department of Justice]: Your Honor, we object to personal opinions.
>
> THE COURT: Objection sustained. The purpose of the opening statement is to summarize the facts [that] the evidence will show [and] state the issues, not to give personal opinions. Proceed, Mr. Wagner.
>
> MR. WAGNER: Thank you, Your Honor. I call this the Case of the Incredible Witness.

The government again objected (*ibid.*). The court sustained the objection, had the jury removed, and admonished Wagner (App. 20–21).[5]

At a later point in his opening statement, Wagner renewed his attack on Cox. The court again had the jury removed and warned Wagner a second time (App. 22). After the jury had returned, Wagner began to recite what the evidence would show up to the time of respondent's indictment and arrest. He quickly returned to the suggestion that Cox had been

[5] Wagner had also annoyed the court at a pretrial hearing by unduly prolonging his argument in support of a motion to suppress that the court considered "obviously frivolous" (App. 21).

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involved in an attempted extortion, however, stating that "[s]ome week or ten days later Nat [Dinitz] began to get telephone calls offering—" (App. 29). At the government's request, the jury was once more removed and the court pressed Wagner for evidence of some connection between the extortion attempt and Cox. When Wagner was unable to offer any such evidence, the trial judge ordered him to leave the courtroom (App. 29–32).

After Wagner had left the courtroom and Meldon had disclaimed any responsibility for the substance of Wagner's opening remarks (App. 33–34), the judge asked Meldon whether he was prepared to assume the lead in trying the case. Meldon responded that he was not since he had not discussed the case with any of the witnesses or otherwise prepared for trial. He further stated that he was reluctant to proceed in the face of respondent's desire to have the case tried by Wagner. The judge thereupon recessed the trial until the following morning, instructed Meldon to prepare to proceed at that time, and indicated that he would consider the entire matter overnight (App. 34–36).

In chambers the following morning, Meldon again stated that respondent did not want him to try the case and that he felt that he "would not be able to give [respondent] a fair trial because my trial strategy and trial tactics would be completely different from those made in the opening remarks * * *" (App. 37–38). Meldon also stated that in his opinion, and in the opinion of co-counsel Baldwin, the court's refusal to permit Wagner to continue as respondent's trial counsel "was well within the discretion of the Court

and would not be reversed by the Court of Appeals" (App. 37) and that he intended to advise respondent to move for a mistrial (*ibid.*).

The judge then reviewed the events of the preceding day and summarized the considerations that had led him to order Wagner's exclusion. He noted that while Wagner had not in his opening statement been permitted fully to discuss the alleged extortion attempt involving respondent, he had suggested that respondent had been the victim of some sort of conspiracy and had made other improper remarks (App. 38–39).[6] He observed further that Wagner had persisted in his efforts to inform the jurors of the extortion attempt, despite the absence of any evidence linking the attempt to undercover agent Cox and despite the court's repeated admonitions against such statements to the jury (App. 39–40). He also noted that an unusually large number of persons, including members of the news media, had appeared for the trial and that he was concerned that the interest of many of those persons was attributable to a local news story to the effect that when the case was tried "there was going to be a shocking matter that the public would hear of" (App. 40). The judge stated that he could only assume that the "matter" referred to in the local media was the alleged extortion attempt directed at respondent (*ibid.*).

[6] Among other things, Wagner had suggested (App. 29) that respondent's arrest had been an "afterthought," effected only after the police had failed to locate another of the boarders at the house where respondent lived. In fact, however, Wagner knew that respondent had been indicted prior to his arrest (Pet. App. 33a).

The judge also set forth some of the alternatives available to respondent and to the court (App. 38–39). He stated that because of Wagner's misconduct and the inferences the jury might draw from being sent out of the courtroom so many times during Wagner's opening statement and from Wagner's absence from the trial, he was "seriously considering granting a mistrial * * *" (App. 40). The judge requested that counsel for respondent consider the available alternatives with respondent and advise the court of respondent's wishes. He also suggested that the government consider the advisability of consenting to the declaration of a mistrial and of retrial at a later date "when there is a possibility that this widespread publicity would not permeate the atmosphere" (App. 40–41).

Following a short recess, Meldon moved for the declaration of a mistrial on respondent's behalf. Respondent's position was explained to the court as follows (App. 41):

> MR. MELDON: Your Honor, I have conferred with the Defendant and he wishes to move for a mistrial at this time and after full consideration of the situation and an explanation of the alternatives before him, he feels that he would move for a mistrial and that this would be in his best interest.

The government did not oppose respondent's motion, and the court announced (App. 42):

> Then I am going to declare a mistrial, gentlemen. I think that under all of the circumstances in this case that it would be in the interest of justice to declare a mistrial and that is what I plan to do.

Prior to his second trial, respondent moved to dismiss the indictment on the ground of double jeopardy and, alternatively, to have Wagner permitted to reenter the case. Both motions were denied by the trial court (Pet. App. 31a–37a). Respondent, a third-year law student, proceeded at his second trial *pro se* and was convicted on both of the counts in which he was charged. He was sentenced to concurrent terms of five years' imprisonment.

2. A divided panel of the court of appeals reversed respondent's conviction (Pet. App. 1a–25a). After granting the government's motion for rehearing *en banc*, the full court affirmed the panel's decision in a brief *per curiam* opinion, with seven judges dissenting (Pet. App. 26a–28a).

According to the two judges who comprised the majority of the panel, respondent's claim that his retrial was barred by the Double Jeopardy Clause involved two relatively distinct issues: first, the "threshold" issue whether respondent's motion for a mistrial was voluntarily made; and, second, if it was not voluntarily made, whether the court's declaration of a mistrial was justified by "manifest necessity." With respect to the first issue, the panel held that the actions of the trial judge in banishing Wagner and threatening to take disciplinary action against Meldon (App. 33–34), coupled with Meldon's lack of preparation and respondent's refusal to be represented by him, gave respondent "no choice but to move for or

accept a mistrial. Under the circumstances of this case * * * [respondent] can hardly be said to have relinquished voluntarily his right to proceed before the first jury" (Pet. App. 13a–14a).

With respect to the "manifest necessity" issue, the panel pointed out (*id.* at 12a):

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial.

On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Instead, because the "die was cast with the trial judge's response to the conduct of defense counsel," the panel held that appellate review was appropriately focused on Wagner's exclusion rather than on the subsequent declaration of a mistrial (*ibid.*). The panel then concluded that means of dealing with Wagner's misconduct short of excluding him from the trial had been available to the trial judge and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, the action of the trial judge in excluding Wagner, when measured by the "manifest necessity" test, constituted an abuse of judicial discretion and barred renewed prosecution of respondent.

The dissenting member of the panel assumed for purposes of argument that the trial judge had erred

in excluding Wagner. But he rejected as mistaken in light of decisions of this Court and, in any event, as "too extreme to be workable," the majority's view that that "error" and the trial judge's granting of respondent's motion for a mistrial operated to bar respondent's subsequent trial (Pet. App. 24a). The test mandated by decisions of this Court, in the view of the dissenting member, was whether the expulsion of Wagner constituted "judicial overreaching"—not whether it was an abuse of discretion (*id.* at 21a). And just as the majority had expressly declined to "characterize the trial judge's actions as judicial overreaching" (*id.* at 13a), so the dissenting member found no evidence of judicial impropriety (*id.* at 23a). The dissent concluded that, by presenting trial judges with the specter of the bar of double jeopardy for errors not attributable to overreaching, the panel's decision would "give rise to much reluctance in granting mistrials" (*id.* at 24a).

SUMMARY OF ARGUMENT

1. The court of appeals' holding in this case departs significantly from the standards that have been announced by this Court to govern application of the constitutional guarantee against double jeopardy. Even if it is conceded that the trial court erred in excluding one of respondent's trial attorneys and that that error figured prominently in respondent's decision to move for a mistrial, a subsequent trial would have offended the Double Jeopardy Clause only if the error complained of also constituted "judicial overreaching"—that is, if the trial judge's action had been

designed to avoid an acquittal by the jury then impaneled. The court refused to hold that the trial judge's action in this case constituted "judicial overreaching," and we submit that the court should have concluded its inquiry at that point and affirmed respondent's conviction.

2. By focusing on the "voluntariness" of respondent's decision to move for a mistrial, the court introduced an entirely new concept into the law of double jeopardy. It is difficult to conceive of a case in which an error committed at trial by the court or the prosecutor, of a type regarded as sufficiently prejudicial to justify the declaration of a mistrial on motion of the defendant, will not have influenced the defendant's decision to seek to end the trial prior to verdict. The decision made by respondent to move for a mistrial certainly was no less "voluntary" than have been similar decisions made by defendants in countless other cases—decisions which have been influenced by prejudicial, though inadvertent, error not attributable to the defense. Indeed, if respondent's decision to move for a mistrial was influenced by error at all, it was an error brought about in significant part by defense misconduct. The effect of the court's decision in this case is greatly to expand the scope of the traditional barriers to renewed prosecution. We submit that such expansion is warranted neither by decisions of this Court nor by an identifiable constitutional or jurisprudential policy.

3. The court of appeals' decision also gravely distorts the standard evolved by this Court for assaying

the propriety of a mistrial declared by a trial court on its own motion. The court applied the test of "manifest necessity" not to the means adopted to deal with the effects of trial error but to the error itself. By definition, however, the commission of error is never "manifestly necessary"; and a test which thus focuses on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered sacrifices the public's interest in fair trials ending in just judgments in the name of unattainably error-free trials. As a practical matter, moreover, we believe that the court's decision will seriously impair the utility of a procedural device—the mistrial—designed as much to protect the criminal accused as to benefit society. Rather than be told by an appellate court that an unintentional error on its part precludes retrial, many trial judges can be expected to adopt the safer course of routinely denying defense motions for mistrial even in the wake of clear error precluding a fair consummation of the trial.

ARGUMENT

I. IN THE ABSENCE OF JUDICIAL OR PROSECUTORIAL OVERREACHING, THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT BAR THE REPROSECUTION OF A DEFENDANT WHO HAS MOVED FOR AND BEEN GRANTED A MISTRIAL

The Fifth Amendment provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb * * *." A number of related policies are subsumed in this constitutional

guarantee. Principles of fairness and finality require that once a person has been convicted and punished for a particular offense he shall not be required to run the gantlet again for the same offense or to suffer multiple punishments. *Ex parte Lange,* 18 Wall. 163; *In re Nielsen,* 131 U.S. 176. Similarly, when a person has been fairly acquitted of an offense, the Double Jeopardy Clause provides assurance that he shall not be made subject to repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187–188.

But the fact that a person has once been placed in jeopardy does not mean that reprosecution is barred under all circumstances. If a defendant succeeds in having his conviction overturned on direct appeal, for example, he does not enjoy any protection against reprosecution. *E.g., Forman* v. *United States,* 361 U.S. 416; *Bryan* v. *United States,* 338 U.S. 552; *Stroud* v. *United States,* 251 U.S. 15; *United States* v. *Ball,* 163 U.S. 662; see also *United States* v. *Jorn,* 400 U.S. 470, 484. The same rule applies if the defendant's conviction is overturned as the result of a successful collateral challenge. *United States* v. *Tateo,* 377 U.S. 463. The principal reasons for holding that the Double Jeopardy Clause does not bar reprosecu-

tion in these circumstances has been explained as follows (*id.* at 466):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. * * *

In cases such as the instant one, in which a criminal trial has been terminated prior to verdict, similar considerations have been invoked in determining the permissibility of retrial. In *United States* v. *Jorn, supra,* 400 U.S. at 485, Mr. Justice Harlan stated in his plurality opinion:

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-

> prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.[7]

This result proceeds logically, indeed inescapably, from the rule permitting retrial following reversal of a defendant's conviction either on direct appeal or in a collateral proceeding. The interest of both the individual defendant and society are well served by a procedural device—the mistrial—that provides an incentive to identify prejudicial error as soon as possible and a means for dealing with that error short of requiring the defendant to proceed to verdict in the face of perceived prejudice (see *United States* v. *Tateo, supra,* 377 U.S. at 468, n. 4).

If retrial were barred after declaration of a mistrial on motion of the defendant but permitted following the defendant's successful appeal, trial courts could be expected to reject such motions in the vast majority of cases. While any verdict of conviction rendered in such a case would be vulnerable to reversal if an appeal were taken, society would at least avoid paying the high price of granting "every accused * * * immunity from punishment because of any defect sufficient to constitute reversible error * * *" (*United*

[7] None of the opinions in *Jorn* expressed disagreement with this fundamental proposition, which has also been stated in many court of appeals' decisions. *E.g.*, cases discussed in n. 19, *infra;* see also *United States* v. *Goldstein*, 479 F. 2d 1061, 1066 (C.A. 2), certiorari denied, 414 U.S. 873; *United States* v. *Pappas*, 445 F. 2d 1194, 1200 (C.A. 3), certiorari denied *sub nom. Mischlich* v. *United States*, 404 U.S. 984; *Gregory* v. *United States*, 410 F. 2d 1016, 1018 (C.A.D.C.), certiorari denied, 396 U.S. 865; *United States* v. *Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937.

States v. *Tateo, supra,* 377 U.S. at 466). But such a rule would itself involve substantial and unnecessary costs, both to the criminal defendant and to society. The defendant would be forced to proceed to verdict in the face of grave and immediate prejudice and to resort to an appeal in the event of conviction in an effort to cure the error of the court or prosecutor. He would then be subject to retrial, many months after his original conviction. Society, on the other hand, would be forced to devote its resources to a proceeding little short of a charade in an effort ultimately to secure a just verdict. See *Illinois* v. *Somerville,* 410 U.S. 458, 469.

It is also true, of course, as this Court has recognized, that the termination of a trial prior to verdict is not a step to be lightly undertaken. The Double Jeopardy Clause affords every criminal defendant a "valued right to have his trial completed by a particular tribunal" (*Wade* v. *Hunter,* 336 U.S. 684, 689); the corollary of this right is a duty on the part of the court and the prosecution to refrain from intentionally bringing about a mistrial—or, put another way, from depriving the defendant "of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal" (*United States* v. *Jorn, supra,* 400 U.S. at 484). Thus, it has been said that reprosecution of a defendant after the declaration of a mistrial, even on the defendant's motion, is not permitted if the mistrial has been brought about "by judicial or prosecutorial impropriety designed to avoid an acquittal * * *" (*id.* at 485, n. 12). On the other hand,

if the court declares a mistrial *sua sponte*, and over the defendant's objection,[8] reprosecution is not permitted unless the court's decision to abort the proceedings was justified by "manifest necessity" or the "ends of public justice." *Illinois* v. *Somerville*, *supra*, 410 U.S. at 469; see also *United States* v. *Perez*, 9 Wheat. 579.[9]

The differences in the standards applied by this Court in measuring the propriety of prosecution after declaration of a mistrial by the court *sua sponte*

[8] While a defendant need not in every case have objected expressly to the declaration of a mistrial in order successfully to claim the benefit of the "manifest necessity" test, the general rule appears to be that if a defendant had ample opportunity to object but did not do so, that fact will weigh heavily in favor of an ultimate finding of consent. See, *e.g.*, *United States* v. *Goldstein*, *supra*, 479 F. 2d at 1066–1068 (C.A. 2); *Roberts* v. *United States*, 477 F. 2d 544, 545–546 (C.A. 8); *United States* v. *Pappas*, *supra*, 445 F. 2d at 1199–1200 (C.A. 3); *United States* v. *Phillips*, 431 F. 2d 949, 950–951 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355–356 (C.A.D.C.), certiorari denied, 344 U.S. 879; *Conner* v. *Deramus*, 374 F. Supp. 504, 507–509 (M.D. Pa.); but see *Galloway* v. *Beto*, 421 F. 2d 284, 288 n. 4 (C.A. 5), certiorari denied, 400 U.S. 912; *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860.

[9] The first case in which this Court held reprosecution prohibited by the Double Jeopardy Clause after the declaration of a mistrial was *Downum* v. *United States*, 372 U.S. 734. At issue in *Downum* was a mistrial declared after the prosecutor had discovered that one of his key witnesses was not present for trial. Relying on *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9), the Court analogized the situation in *Downum* to a case in which the prosecutor discovered after trial had commenced that he had insufficient evidence to convict. See also *United States* v. *Glover*, 506 F. 2d 291 (C.A. 2). The general approach of *Cornero* had been rejected as too rigid in *Wade* v. *Hunter*, *supra*, 336 U.S. at 691, in a discussion cited approvingly in *Illinois* v. *Somerville*, *supra*, 410 U.S. at 462.

and after declaration of a mistrial on motion of the defendant or with the defendant's consent stem from the crucial fact that in the one case it is the defendant who has exercised an option not to submit his case to the jury then impaneled, whereas in the other that option has been taken from him by the court (see *United States* v. *Jorn*, *supra*, 400 U.S. at 484).

Thus, if the defendant has been given an opportunity to object to the declaration of a mistrial but has chosen not to do so, or if, as here, the defendant has himself requested a mistrial, he thereby necessarily indicates that his interest in securing what may be a conclusive determination in his favor from the jury then impaneled is outweighed by countervailing interests.[10] By its very nature, the ultimate decision made by the defendant in this regard is never free of external influences; it is inevitably the product of competing considerations over which the defendant cannot have complete control. But unless the decision has been foreordained by conscious wrongdoing on the part of the court or prosecutor, designed to avoid an acquittal by the jury then impaneled, "the public's interest in fair trials designed to end in just judgments" (*Illinois* v. *Somerville*, *supra*, 410 U.S. at 470, quoting from *Wade* v. *Hunter*, *supra*, 336 U.S. at 688–689) requires the defendant to make that decision

[10] Generally, these interests will center upon the desire to avoid conviction by a jury after a seriously flawed trial, with the attendant adverse publicity and probable need to undergo a second trial, or the risk that the error ultimately will be deemed insufficient to void a conviction.

and permits retrial in the event he seeks or acquiesces in a pre-verdict termination of his trial.

In the present case, the court of appeals departed significantly from the standards that have been evolved by this Court to govern application of the guarantee against double jeopardy after a mistrial declared in response to a defense motion. As noted earlier, the majority of the panel and of the court of appeals *en banc* expressly declined to characterize the trial judge's action as "judicial overreaching" (Pet. App. 13a, 26a). Neither has respondent suggested that the trial judge acted in bad faith—that is, that either the exclusion of one of his trial attorneys or the ultimate declaration of a mistrial were actions "designed to avoid an acquittal" (*United States* v. *Jorn, supra,* 400 U.S. at 485, n. 12). Indeed, the facts of this case foreclose any possibility that the events at the first trial were so motivated. At the point that the trial was terminated, the first witness had yet to be called, and there was virtually no indiction of the likely outcome of the trial.[11]

[11] In contrast to the English rule, which conditions jeopardy upon the entry of judgment of acquittal or conviction, see Archbold, *Pleading, Evidence & Practice in Criminal Cases*, Secs. 598, 603 (35th ed. 1962), it has been held that jeopardy attaches in criminal trials in the federal courts when a jury has been impaneled and sworn (*e.g.*, *Downum* v. *United States*, *supra*) or when the court in a nonjury trial has begun to receive evidence (*e.g.*, *McCarthy* v. *Zerbst*, 85 F. 2d 640 (C.A. 10), certiorari denied, 299 U.S. 610). See *Serfass* v. *United States*, No. 73-1424, decided March 3, 1975 (slip op. 10-11). The highest court of one state has recently concluded that the prevailing federal rules concerning when jeopardy attaches are bottomed upon this Court's rulemaking authority over trials in federal courts rather than upon the Fifth or Fourteenth Amendments and has adopted the recommendation in the Model Penal Code that jeopardy should attach, in jury as well as in nonjury trials, when the first witness is sworn. See *State* v. *Cunningham*, 17 Crim. L. Rep. 2151 (Montana Sup. Ct., decided May 2, 1975); see A.L.I., Model Penal Code, § 1.08(4) (Proposed Official Draft, 1962).

In any event, it seems clear that in the circumstances of this case—in which the first witness had yet to be called—respondent was as a practical matter relinquishing very little of value in moving for a mistrial. The trial to that point was going neither well nor badly so far as the actual evidence was concerned, and the next jury was as likely to be favorably disposed toward him as the one then impaneled. Any prejudice that had occurred, moreover, appears in retrospect to have been rather evenly balanced between the government and the defense. This is not, then, a case like *Downum* v. *United States*, *supra*, in which the mistrial may have operated as a post-jeopardy continuance to permit the prosecution to strengthen its case. Nor is there any reason to believe that if the Double Jeopardy Clause is held not to have barred respondent's reprosecution, the rule of this case will lend itself to prosecutorial or judicial manipulation in favor of the government. See *Illinois* v. *Somerville*, *supra*, 410 U.S. at 464.

Far from disclosing judicial overreaching, the record establishes that the trial judge's decision to exclude Wagner was made only after Wagner had repeatedly ignored the court's clear instructions and had engaged in what the court reasonably regarded as contumacious conduct. As pointed out by Judge Bell in his dissent from the panel's decision in this case, there is strong support in the record for the trial judge's conclusion that Wagner was bent upon a conscious course of baiting the court in the hope of triggering a mistrial (Pet. App. 23a). Within a period of only a few minutes, the trial judge was compelled to excuse the jury three times in order to admonish

Wagner. But despite these repeated warnings, Wagner persisted in the very conduct for which he had been admonished. Most significantly, he continued to attempt to imply in the jury's presence—without any evidentiary support whatever—that the principal prosecution witness had been involved somehow in an extortion attempt directed at respondent.[12]

In these circumstances, we submit that the trial judge was fully justified in excluding Wagner in an effort to preserve the integrity of the proceedings. The court of appeals suggested (Pet. App. 18a) that the trial judge should instead have (1) warned Wagner that he would be cited for contempt if his misconduct continued, (2) actually cited him for contempt and imposed post-trial sanctions for each citation, (3) caused a complaint to be filed with the grievance committee of the state bar association, and/or (4) taken other post-trial steps to prevent Wagner

[12] We do not agree with the statement of the panel majority (Pet. App. 15a–16a) that in excluding Wagner the trial court was reacting to "anticipated," rather than to actual, prejudice. Although Wagner was never permitted fully to discuss before the jury the significance of the alleged extortion attempt directed at respondent, he had succeeded in characterizing the government's case as "The Case of the Incredible Witness" (App. 20), stated that respondent's receipt of certain telephone calls represented the "really * * * unusual circumstances" (App. 29) of the case, and asserted that respondent's arrest had been merely an "afterthought" (*ibid.*). Those comments, coupled with the possible prejudice to respondent from the jury being sent out of the courtroom so many times during Wagner's opening statement and from the publicity surrounding the case, led the court to conclude—we submit with good reason—that the government's as well as respondent's right to a fair trial had been prejudiced (App. 40). See discussion at pp. 4–8, *supra*.

from being admitted to practice before the United States District Court for the Northern District of Florida. But reminding Wagner of the possibility of future punitive action, either through the contempt process or bar disciplinary proceedings, would have done nothing to eliminate from the trial the effects of the misconduct in which Wagner had already engaged and little to provide assurance that he would have conducted himself in the future in accordance with the court's instructions. Similarly, citing Wagner for contempt of court, but deferring imposition of punishment, would not have cured the prejudicial effects of the misbehavior that had already occurred. The court could reasonably have concluded, moreover, that actually citing Wagner for contempt prior to the conclusion of the trial might have rendered him unable to provide respondent with an appropriately vigorous defense.[13]

[13] In support of its holding that the trial court had erred in excluding Wagner, the court of appeals cited *Carsey* v. *United States*, 392 F. 2d 810 (C.A.D.C.), and *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.), for the proposition that the declaration of a mistrial on the ground of defense misconduct "would not be proper except in case of misconduct going to the very vitals of the trial itself" (Pet. App. 17a). Such misconduct is not established, according to the court, unless the trial has been infected with prejudice not curable through a cautionary instruction (*id.* at 16a). But this proposition hardly controls the present case since, unlike the situation in *Carsey* and *Whitlow*, the trial judge did not respond to the prejudice caused by the defense misconduct by declaring a mistrial but by removing the source of that prejudice—Wagner. The court had no reason to believe at that time that a mistrial would have to be declared subsequently (see discussion at pp. 27–30 *infra*). When

This Court need not decide, however, whether the trial court acted properly in excluding Wagner in order to hold that respondent's reprosecution was not barred by the Double Jeopardy Clause. Even if the court's exclusion of Wagner was erroneous, that error does not justify a departure from the standard enunciated in *Jorn, supra,* 400 U.S. at 485, permitting reprosecution after a mistrial declared on motion of a defendant in the absence of prosecutorial or judicial overreaching. We submit that once the court of appeals concluded that in excluding Wagner the trial judge had not been motivated by a desire to avoid an acquittal of respondent, it should have ended its inquiry and affirmed respondent's conviction.

II. THE FACT THAT RESPONDENT'S DECISION TO MOVE FOR A MISTRIAL MAY HAVE BEEN INFLUENCED BY JUDICIAL ERROR IS NOT RELEVANT TO THE ISSUE OF THE PERMISSIBILITY OF HIS REPROSECUTION

In explaining its refusal to apply the "judicial overreaching" standard enunciated in *Jorn, supra,* 400 U.S. at 485, in determining whether reprosecution of

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the trial was terminated, moreover, it was in response to a defense motion.

To the extent that the court of appeals' holding that exclusion of Wagner was error stemmed from the court's view that such a course is never appropriate in the absence of a contemporaneous declaration of a mistrial (see Pet. App. 4a), we submit that such view should be rejected. The court's exclusion of Wagner left respondent with two retained attorneys to represent him and provided at least some chance that the trial could proceed to verdict. With Wagner present, there was good reason to believe that further misconduct—with attending prejudice—was inevitable and that that misconduct ultimately would have made an already unfortunate situation irretrievable.

respondent was barred by the Double Jeopardy Clause, the panel majority focused on the "voluntariness" of respondent's decision to move for a mistrial (Pet. App. 13a–14a):

> Using a defendant's consent to a mistrial to bar his subsequent complaint of double jeopardy implies that he has bound himself to accept an abandonment of the first trial by exercising something more substantial than a Hobson's choice. If a defendant is able to continue the trial even though harmed by prosecutorial or judicial error, but desires to abort that proceeding, he has waived his right to proceed before the jury first selected. In the instant case, however, the actions of the trial judge had the effect of rendering [respondent] unable to conduct his defense. With Wagner excluded and Meldon disabled, [respondent] had no choice but to move for or accept a mistrial. Under the circumstances of this case, * * * he can hardly be said to have relinquished voluntarily his right to proceed before the first jury [footnote omitted].[11]

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[11] In support of this holding, the panel quoted from *United States* v. *Walden*, 448 F. 2d 925 (C.A. 4). In *Walden*, the Fourth Circuit panel had held that the consent of several of the defendants to the declaration of a mistrial had in effect been coerced by the trial judge and that termination of the trial by the judge on his own motion had not been justified by manifest necessity. Prior to the *en banc* decision in the present case, however, the panel decision in *Walden* was superseded by an order of the Fourth Circuit *en banc* (458 F. 2d 36), affirming by an evenly-divided court the decision of the district court that manifest necessity for the mistrial had existed. The full court in *Walden* did not reach, therefore, the issue of consent. Petitions for writs of certiorari were denied *sub nom. Cook* v. *United States*, 410 U.S. 969, and *sub nom. Ard* v. *United States*, 409 U.S. 867.

It is difficult to understand precisely what the court of appeals had in mind in discussing the "voluntariness" of respondent's decision to move for a mistrial and in ultimately holding that decision to have been involuntary. The court failed to offer meaningful standards for determining when a departure from the *Jorn* formulation is appropriate. We submit, moreover, that, properly analyzed, its "voluntariness" standard is entirely inappropriate to the constitutional inquiry and that, even if "voluntariness" might sometimes be pertinent, it was not a proper criterion on the facts of this case.

The error in the court of appeals' analysis would appear to follow *a fortiori* from this Court's decision in *United States* v. *Tateo, supra*. There, the defendant's guilty plea, entered after trial had begun, was subsequently found to have been coerced by certain statements made to his attorney by the trial judge.[13] Prior to the beginning of his second trial, the defendant sought to have the charges against him dismissed on the ground that reprosecution would offend the Double Jeopardy Clause. Although Tateo's first trial had been terminated short of verdict as a result of actual

[13] The trial judge had informed Tateo's attorney on the fourth day of trial that if the jury found Tateo guilty he would impose a life sentence on one of the pending charges and consecutive sentences on the remaining charges. Upon being told of the judge's statement by his attorney and advised that the likelihood of his conviction was great, Tateo changed his plea of not guilty to guilty. In a subsequent Section 2255 proceeding, Tateo's conviction was set aside and he was allowed to withdraw his plea because of the court's finding that the plea had been coerced.

and improper coercion, this Court rejected his contention, stating that if the defendant "had *requested* a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him" (377 U.S. at 467; original emphasis). This observation would appear to be directly applicable to the instant case.

Moreover, as already noted, it is well settled that reprosecution of respondent would have been permitted had the trial court denied his motion for a mistrial and had his subsequent conviction been reversed on appeal. No identifiable policy is served by the court of appeals' holding that reprosecution is precluded because respondent's first trial ended with the declaration of a mistrial rather than with a reversible or collaterally vulnerable conviction. As this Court noted in *Tateo* (377 U.S. at 467):

> A defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial.

In any event, it is simply inaccurate to characterize respondent's motion as involuntary on the facts of this case. Like any defendant aggrieved by the occurrence of error during trial, respondent faced a concededly difficult choice between going forward, thereby running the risk of conviction and affirmance on appeal, or relinquishing the right to have his case determined

by the jury then impaneled. But the particular course that he chose—that is, to request termination of the trial prior to verdict—was involuntary only in the sense that he was forced by the exclusion from the trial of one of his attorneys to make a choice at all. Conceding that respondent was called upon to make a choice between stopping the proceedings or going forward, however, his decision to move for a mistrial was by no means inevitable. Respondent could have permitted one or both of his two remaining attorneys to represent him in the trial, and he could have sought a continuance to afford them an opportunity to decide how best to do so.[16] He could also have proceeded for the remainder of the trial *pro se,* which is what he chose to do at his second trial. In either event, he could then have appealed had he been convicted—contending that the trial court committed reversible error in excluding one of his three attorneys.

In weighing these alternatives, respondent was assisted by two competent attorneys of his own choos-

[16] The panel majority discounted this possibility by stating that "[t]he threats to Meldon placed the only remaining trial attorney in the inconsistent position of having to protect his own standing as a member of the bar of the Northern District of Florida against any suggestion of complicity with the line of defense Wagner had begun and of acting as a vigorous and effective advocate on behalf of [respondent]" (Pet. App. 11a). At the same time, however, the panel concluded that the trial court should have more fully considered, among other things, reminding Wagner of the possibility of future disciplinary proceedings against him or actually citing him for contempt (*id.* at 18a). If further conduct of the trial by Meldon was not possible because of possible disciplinary action, we fail to understand why the same was not true with respect to Wagner.

ing. The record also discloses, moreover, that he was given adequate opportunity to consult with his attorneys concerning the alternatives available to him (see discussion at pp. 6–8, *supra*). Moreover, the court of appeals' conclusion that respondent was left with no choice but to move for a mistrial when the trial court excluded Wagner—and that the trial judge should have understood that fact and, accordingly, should have considered Wagner's exclusion in terms of its manifest necessity—ignores at least two critical facts: first, the trial judge had no reason to suspect that respondent, when actually faced with the decision, would refuse to be represented at trial by his two remaining attorneys—one of whom, Meldon, had represented him throughout the pretrial proceedings and was undoubtedly familiar with the critical aspects of the case; and, second, Meldon and Baldwin were prevented from representing respondent for the remainder of the trial because of a conscious choice on respondent's part not to permit them to do so.[17]

Finally, in considering whether respondent's request for a mistrial was "voluntary," we think it

[17] The trial judge cannot fairly be faulted for failing to solicit additional information concerning respondent's likely response to Wagner's exclusion before acting. There is no reason to believe that respondent had finally formulated a response prior to Wagner's actual exclusion and, more importantly, had the judge asked him to do so, respondent would have had such a substantial incentive to suggest that he would not permit his two remaining attorneys to represent him and would therefore be unable to proceed (since such a response would have discouraged the court from excluding Wagner) as to make any response to that question inherently unreliable.

was wholly inappropriate to ignore the role that the defense itself played in creating the circumstances that led to the expulsion of Wagner and the declaration of mistrial. This was not a case in which the defense mistrial motion resulted from errors by court or prosecutor wholly beyond the control of the defense. Since the "dilemma" in which the defense found itself with the expulsion of Wagner was substantially contributed to by what the court of appeals conceded to have been defense misconduct (which, while it may not yet have made a fair trial, for the government as well as the defendant, impossible, had certainly begun to imperil the prospects for one), the court of appeals should not have held the mistrial motion involuntary.[18]

In summary, respondent's decision to move for a mistrial was not a "Hobson's choice"; rather, it represented an effort to pursue what seemed to respondent at the time, in light of the possible consequences

[18] While the broad question is not presented here, it is our position that the Double Jeopardy Clause should not be held, as a general matter, to bar reprosecution whenever a mistrial results from a chain of events for which the defense is responsible in substantial part. In both *Downum* and *Jorn*, the only cases in which this Court has held reprosecution prohibited by the Double Jeopardy Clause after declaration of a mistrial, defense misconduct was not involved in any way in the precipitating events leading to the mistrial. The Chief Justice may have had such a situation in mind, however, when he noted in his concurring opinion in *Jorn* that he would have voted to permit reprosecution there had "the accused * * * brought about the erroneous mistrial ruling * * *" (400 U.S. at 488). See also *Carsey* v. *United States*, 329 F. 2d 810, 815 (C.A.D.C.) ("Under the doctrine of necessity, misbehavior by defense counsel that intrudes on a fair trial permits a mistrial without prejudice to a retrial") (Levanthal, J., concurring).

of continuing with the trial, to be the most advantageous course available. Surely, respondent's decision not to go forward with the trial was substantially more "voluntary" than the decision of the defendant in *United States* v. *Tateo, supra,* to terminate his trial by pleading guilty—a plea subsequently found to have been coerced. Indeed, it is hard to see how respondent's decision to move for a mistrial was any more "involuntary" than that of any other defendant confronted with an error by court or prosecutor that seriously prejudices his prospects for a fair verdict and therefore "compels" him to seek the termination of the trial.[19] Thus, the effect of the court

[19] In countless cases, trial courts have exercised their discretion to declare a mistrial on defense motion made in response to an inadvertent error committed by the court or prosecutor. In each of those cases, the defendant's request for the declaration of a mistrial could be said to have been "involuntary" in the sense that in making the request the defendant reasonably believed that the error had gravely prejudiced his defense. For example, in *Roberts* v. *United States*, 477 F. 2d 344 (C.A. 8), the defense motion for a mistrial was made and granted after the court had inadvertently and erroneously made certain comments that could have been interpreted by the jury as criticism of the trial tactics of an attorney for two of the defendants. In *United States* v. *Kwitek*, 467 F. 2d 1222 (C.A. 7), certiorari denied, 409 U.S. 1079, the defendant's motion for a mistrial was granted after it had become apparent that a summary of the defendant's prior record had been inadvertently sent into the jury room and the jury had looked at it. A mistrial was declared on defense motion in *United States ex rel. Montgomery* v. *Brierley*, 414 F. 2d 552 (C.A. 3), because of the court's conclusion that the defendant had been prejudiced by certain references made by the prosecutor in his closing statements. In *United States* v. *Henderson*, 439 F. 2d 531 (C.A.D.C.), a mistrial was declared on defense motion after the prosecutor announced in the jury's presence that he planned to call the

of appeals' decision in this case is to expand greatly the traditional barriers to renewed prosecution.

The irony of the decision is that, while expanding the scope of the Double Jeopardy Clause, it severely limits the occasions on which declaration of a mistrial would be appropriate—even when such relief is sought by the defendant in the wake of perceived prejudice. If that prejudice was caused by error committed by the court or prosecutor, however inadvertently, retrial following declaration of a mistrial would be precluded in the absence of "manifest necessity" for the mistrial. Consequently, whenever prosecutorial or judicial error could arguably be cured by an instruction to the jury, for example, the court of appeals' decision would require the trial court to reject the defense motion for a mistrial—even if the trial court were to conclude, taking all circumstances into account, that terminating the trial at the defendant's behest would be the fairer course. This result seems to us palpably incompatible with sound principles of judicial administration and with the spirit of the Double Jeopardy Clause as well.

III. IN THE CIRCUMSTANCES OF THIS CASE, THERE EXISTED IN ANY EVENT MANIFEST NECESSITY FOR THE DECLARATION OF A MISTRIAL

Even if it were proper to treat the present case as though the trial court had acted *sua sponte* in declar-

defendant's mother as a rebuttal witness and then failed to do so. In all of the cases discussed above, reprosecution was held not to be barred by the Double Jeopardy Clause.

ing a mistrial, reprosecution of respondent was nevertheless permissible, since termination of the trial was "manifestly necessary" in light of respondent's unwillingness to permit his two remaining trial attorneys to represent him. The governing standard applicable in such circumstances appeared initially as dictum in *United States* v. *Perez,* 9 Wheat. 579. In that case, the Court held that the inability of a jury to agree on a verdict justified the declaration of a mistrial and subsequent reprosecution (*id.* at 580):

> We think, that in all cases of this nature, the law has inves'ed courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.
> * * * [20]

This Court has been required in numerous cases since *Perez* to determine whether a court's *sua sponte* declaration of a mistrial precluded reprosecution. The standard used repeatedly in such cases is that first announced in *Perez*—whether the court's decision to terminate the trial was justified by "manifest necessity" or the "ends of public justice." *E.g., Illinois* v. *Somerville, supra; Downum* v. *United States, supra; Gori* v. *United States,* 367 U.S. 364; *Wade* v. *Hunter, supra; Lovato* v. *New Mexico,* 242 U.S. 199;

[20] See also *Green* v. *United States,* 355 U.S. 184; *Keerl* v. *Montana,* 213 U.S. 135; *Dreyer* v. *Illinois,* 187 U.S. 71; *Selvester* v. *United States,* 170 U.S. 262; *Logan* v. *United States,* 144 U.S. 263.

Thompson v. *United States*, 155 U.S. 271; *Simmons* v. *United States*, 142 U.S. 148.

In *Somerville*, where the issue has been most recently considered, the defendant was brought to trial under an indictment defective under Illinois law. The defect, which was not curable by amendment and which could have been asserted by the defendant to overturn any judgment of conviction, was discovered by the prosecutor before any evidence was introduced—but not before the jury had been impaneled and sworn. Over the defendant's objection, the trial court declared a mistrial. The defendant was subsequently reindicted, tried and convicted. In rejecting the contention that reprosecution was barred by the Double Jeopardy Clause, this Court stated (*id.* at 464):

> While virtually all of the cases turn on the particular facts and thus escape meaningful categorization * * *, it is possible to distill from them a general approach, premised on the "public justice" policy enunciated in *United States* v. *Perez*, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

The panel appeared to concede in its opinion in this case that at the time the declaration of a mistrial was being considered, such a course was justified by "manifest necessity" and the "ends of public justice." According to the panel majority, the court was at that time faced with three possible courses of action: first, it could have required continuation of the trial; second, it could have granted a continuance of sufficient length to permit respondent to employ new counsel; and, third, it could have declared a mistrial (Pet. App. 10a). The panel concluded, however, that "[p]roceeding with the trial would have been so altogether unreasonable as to carry the probability of a reversal on appeal" (*id.* at 11a). The panel also concluded that granting a continuance so that respondent could secure new counsel would similarly have "failed *Somerville's* 'general approach'" (*ibid.*):

> There would have been a very real probability of prejudice inherent in releasing the jurors to go about their normal affairs in contact with the general public and news media for such a period of time. Sequestering them would have been out of the question. Additionally, the break in the continuity of the trial would poorly serve juror's memories. Most importantly, however, a continuance would saddle [respondent] with the unfavorable inferences the jurors would surely draw from the delay itself and from Wagner's absence at the rescheduled trial.

The court refused to focus its attention on the circumstances that existed at the time the declaration of a mistrial was being considered, however, because

"[t]he die was cast with the trial judge's response to the conduct of defense counsel" (*id.* at 12a). We submit that this conclusion is factually unsupportable and that the significance attached to it by the court in this case represents a radical and unwarranted departure from this Court's holdings in *Perez, Somerville* and related cases.

As noted earlier (see discussion at pp. 27–30, *supra*), the record in this case simply does not support the conclusion that the declaration of a mistrial was made inevitable by Wagner's exclusion. Among other things, respondent could have permitted one or both of his two remaining trial attorneys to proceed on his behalf. If convicted, he could have appealed contending that Wagner's exclusion was error justifying the granting of a new trial. The fact that respondent chose not to proceed reveals only that, after consideration of the available alternatives, he concluded that termination of the trial was, as his counsel stated, "in his best interest" (App. 41).

More importantly, however, we believe that the court of appeals erred in focusing on the trial court's decision to exclude Wagner from the trial rather than on the circumstances that existed at the time the declaration of a mistrial was being considered. By definition, the commission of error is never "manifestly necessary." It could hardly have been reasonably contended that the prosecutor's failure in *Somerville* to scrutinize the indictment prior to the impaneling and swearing of the jury to ensure that it stated an offense under Illinois law was "manifestly necessary."

Neither was the prosecutor's failure in *Lovato* v. *New Mexico*, 242 U.S. 199, to make sure that the defendant had pleaded to the indictment after his demurrer had been overruled an error that could be regarded as "manifestly necessary." Indeed, had application of the Double Jeopardy Clause turned upon the avoidability of errors not chargeable to the defendant, *Somerville, Lovato,* and countless similar cases would have been decided in favor of defense claims of double jeopardy. At bottom, a test such as that employed by the court of appeals in the present case, focusing on the avoidability of errors committed at trial rather than on the alternatives available to the trial judge at the time the declaration of a mistrial is being considered, sacrifices the public's interest in fair trials ending in just judgments in the name of unattainably error-free trials.[21] The effect of the holding of the court of appeals is that, once the trial judge made the "error" of exclud-

[21] Had the original trials in *Downum* and *Jorn* proceeded to verdict, there is no reason to believe that any resulting judgment of conviction would have been vulnerable to reversal on appeal. In *Downum*, the missing witness was essential to the presentation of the government's case on only two of the six counts in the indictment. In *Jorn*, the court could have granted a short continuance to permit the witnesses to consult with attorneys. The principal defect in the courts' *sua sponte* declarations of mistrials in those cases, then, was the failure adequately to consider alternatives to termination of the trials. The crucial difference in the present case, adopting the court of appeals' conclusion that the trial court erred in excluding Wagner, is that the trial court "could reasonably have concluded" (*Somerville, supra*, 410 U.S. at 459) that any resulting judgment of conviction of respondent in the original trial would have been reversible on appeal.

ing Wagner, respondent was thereafter immune from prosecution for his offense.[22]

Neither do we perceive any substantive distinction, so far as the policies subsumed in the Double Jeopardy Clause are concerned, between what the court of appeals referred to as an error that is "so damaging to the defendant" that he concludes that "he cannot proceed with his case" (Pet. App. 26a) and an unintentional error that carries with it the certainty of reversal on appeal. *Illinois* v. *Somerville, supra,* 410 U.S. at 464. In either case, continuation of the trial, while physically possible, would be a futile and wasteful course of action. And in either case, therefore, the law empowers the trial judge—irrespective of the source of the error—to end the trial on his own motion. Thus, even applying the reasoning of the majority opinions below, what this Court said in *Somerville* has equal application here (410 U.S. at 464):

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

It may be argued that the high price to the ends of public justice placed by the decision below upon errors occurring at trial will encourage trial judges (and prosecutors) to proceed more circumspectly be-

[22] The trial court could have avoided this result only by forcing respondent and the prosecution to go forward with the trial over the objections of both—an alternative that the court of appeals properly regarded as undesirable (see discussion, *supra*, p. 35).

fore acting in ways that make declaration of a mistrial "inevitable." We submit that any such suggestion is unsound and unrealistic. The more likely result of the court's ruling is the manifestly undesirable one noted in one of the dissenting opinions below (Pet. App. 24a):

> The trial courts will understand that society will be better served by completing a trial, even after clear error has arisen and the defendant seeks the mistrial, than the alternative of a mistrial and the possible bar of double jeopardy based on the error. The time and expense involved in completing the trial, taking an appeal, and in the retrial will often be a small price to pay to protect the societal interest in law enforcement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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